Supreme Court, U.S.
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88 - No. 1930

# In the Supreme Court of the United States

OCTOBER TERM, 1988

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MARTIN D. MARTINEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS**

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JUNE 1989

## QUESTION PRESENTED

May the United States ignore the procedures of its own administrative regulation and prosecute an individual using evidence of drug abuse obtained in violation of the privileges and benefits of a voluntary rehabilitation program.

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MARTIN D. MARTINEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

---

The petitioner, Martin D. Martinez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on April 3, 1989.

### OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 28 M.J. 56 (C.M.A. 1989) (Appendix A). The opinion of the Air Force Court of Military Review was issued in an unreported decision on June 19, 1987 (Appendix B).

### JURISDICTION

The final order of the United States Court of Military Appeals was entered on April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp III 1985) and 10 U.S.C. § 867(h) (Supp III 1985).

## CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

Air Force Regulation 30-2, Personnel, Social Actions Program, 22 June 1981, Intermediate Message Change 83-2, 22 December 1982, provides in pertinent part the following:

> **Chapter 4 – Rehabilitation**
>
> **Section B – Identification of Abusers**
>
> **4-3. Identification and Drug and Alcohol Abuse Control Evaluation (DAAEP) Process:**
>
> **d. Self Identification.** Personnel with drug and alcohol problems are encouraged to seek assistance. Air Force members concerned about a drug or alcohol problem may refer themselves for the evaluation process. Personnel in this status must complete the DAAEP to assess the scope of their problem. Following the DAAEP a Rehabilitation Committee will recommend an appropriate course of action to the commander.
>
> (1) Under the conditions specified below, an Air Force member's voluntary submission to an Air Force Treatment and Rehabilitation Program, and self-disclosed evidence of prior personal drug use or prior possession of drugs for personal use voluntarily disclosed by the member as part of the first entry into such programs, may not be used against the member in disciplinary action under the U.C.M.J. or to characterize an administrative discharge:
>
> (A) Members voluntarily reveal the nature and extent of their drug involvement to their unit

commander, first sergeant, social actions personnel or medical personnel before they are apprehended, placed under investigation for drug abuse, ordered to give a urine sample under para 4-2d(1)(A), (B), (D) above, or advised of a recommendation for administrative separation for drug abuse; and

(B) Members identify themselves with the intention of receiving rehabilitation; and

(C) Members are determined to have a substantiated drug abuse problem [as explained in para 3-3d(7).]

(2) Members are considered to be under investigation when the appropriate initial case entry is made in a security police blotter or the security police investigator's log of cases, or when a commander has requested (either in writing or verbally) an investigation according to AFR 124-4.

(3) The limitations of para 4-3d(1) apply only to the member's self-disclosed personal use of drugs or possession of drugs for personal use which occurred prior to the disclosure. The limitations do not apply to:

(A) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been introduced by the member; and

(B) Disciplinary or other action based on independently derived evidence, including evidence of drug abuse after the member's first entry into the Drug Treatment and Rehabilitation Program.

(5) The above provisions must be fully explained to individuals who present themselves as drug users before eliciting information about their possible drug abuse or accepting assertions on their part that they are in fact drug abusers in the absence of corroborating information.

## STATEMENT OF THE CASE

The petitioner, an Air Force Airman First Class (E-3), was tried by a general court-martial in a judge alone trial at Luke Air Force Base, Arizona on August 21, 1986. He pled not guilty to two specifications of absence without leave[1] and one specification of wrongful use of cocaine. The petitioner was found guilty of use of cocaine on May 12, 1986.[2] He was sentenced to a bad conduct discharge, hard labor without confinement for three months, restriction to base for two months, forfeiture of $426.00 per month for four months, and reduction to airman basic (E-1).

On May 11, 1986, the petitioner had informed a friend and fellow Air Force member, Sergeant Gregory Foster, that he had been using cocaine to cope and wanted help in getting rehabilitated. (R. 38). Relying upon Foster's advice, petitioner contacted Senior Master Sergeant John Newberry, the Noncommissioned Officer in Charge of the petitioner's unit who functioned as a first sergeant in the unit. (R.39). The petitioner also met with Staff Sergeant Gregory Haney, his supervisor. They had agreed that the

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[1] The petitioner's absence without leave conviction is not at issue in this case. However, it should be noted that an offense of this magnitude is typically resolved through administrative nonjudicial punishment.

[2] The appellant was originally charged with use of cocaine "from 1 October 1985 to about 14 May 1986". The military judge found him guilty by exceptions to use of cocaine on "about 12 May 1986."

petitioner should turn himself in to Social Actions on Monday because of his drug problem. (R. 59, 65). Other than generally indicating to Foster, Haney, and Newberry that he had a drug or cocaine problem, the petitioner had not provided, at that time, any detailed information on his drug abuse. (R. 40, 59, 71).

On Monday morning, May 12, 1986, Newberry called Senior Master Sergeant John Brewer, the first sergeant, and told him the petitioner "was using cocaine and scared." (R. 98). At that time petitioner had not been under investigation nor suspected of drug abuse. Brewer immediately called Social Actions and spoke with Staff Sergeant Ledora McDougle, a drug and alcohol counselor. (R. 98). Brewer told her that petitioner had been using drugs and that he wanted help. (R. 98, 128). Brewer directed McDougle to call him as soon as the petitioner arrived at Social Actions.

When petitioner arrived at Social Actions on May 12, 1986, he informed McDougle that he wanted to turn himself in for a drug problem. (R. 60, 72). McDougle did not explain the self-identification program of AFR 30-2, nor did she advise him of his rights under Article 31, UCMJ.[3] Rather she told the petitioner that she had to call Brewer. (R. 60). When Brewer arrived, he "pretty much took over the show." (R. 73).

Without reading the petitioner his Article 31 rights, Brewer preempted the petitioner's efforts to self-identify and began gathering evidence against the appellant for disciplinary action. Brewer started by saying "From Ser-

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[3] Although in form and substance nearly identical to rights advisements required by *Miranda v. Arizona*, 384 U.S. 436 (1966), Article 31, UCMJ, is broader in application. Military members must be advised of their rights if any person subject to the Code, who is acting in an official capacity, suspects they have committed an offense.

geant Newberry I understand you're using cocaine." Brewer then asked the petitioner if he would consent to a urine test. (R. 99). The petitioner consented, bu' 'hen Brewer stated "If you don't, the commander can direct you." Petitioner replied," "Well, then I'd have to go anyway?" Brewer said, "That's right, but I want you to understand that you don't have to consent." (R. 100).[4] Brewer also admitted that the urinalysis' purpose was solely for prosecution of the appellant. (R. 113).

After providing a urine sample, the petitioner and Brewer returned to Social Actions. Brewer finally advised petitioner of his Article 31 rights, and began questioning him regarding his cocaine abuse. Petitioner waived his rights and provided that he had been abusing cocaine daily since January 1986 and that he had last ingested cocaine 4:30 a.m. on Sunday, May 11, 1986. (Pros. Exh. 5).

After the questioning, petitioner was examined by an Air Force psychiatrist because the petitioner had raised concerns about his ability to cope with withdrawal from his cocaine addiction. The doctor, believing that the petitioner would be restricted in some way, did not commit him to the hospital. Instead, he arranged to have medication for appellant's severe craving for cocaine available at the emergency room. (R. 11-13).

Having determined the hospital would not admit the petitioner and that no legal basis existed for pretrial confinement, Brewer decided there was "nothing left here except to let him go home when he's done here [at the hospital]." (R. 114). Brewer instructed petitioner to stay at the hospital until he had completed a medical urinalysis for the psychiatrist.

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[4] Petitioner's consent to provide a urine specimen would most likely be found involuntary under *U.S. v. White*, 27 M.J. 264 (C.M.A. 1988) and therefore, the results of the test would be inadmissible in a court-martial.

The petitioner returned home severely distressed that the Air Force had taken his cocaine addiction so lightly and believing that he would not receive any help. (R. 61). That evening petitioner, in a deep depression, attempted suicide by taking an overdose of cocaine. (R. 158-159).

On May 14, 1986, petitioner, believing that he was finally being entered into a drug rehabilitation program, admitted to his use of cocaine on May 12th to McDougle and a physician's assistant who was performing a medical examination. A urine test taken at that time also disclosed the presence of cocaine metabolite. (R. 89, 124).

On the afternoon of May 14, 1986, petitioner's commander ordered him into pretrial confinement at a local civilian jail. After two weeks confinement, petitioner arranged on his own to participate in the jail drug rehabilitation program. He never received any rehabilitation under the Social Actions program. (R. 159).

The United States Air Force Court of Military Review upheld the conviction in an unpublished opinion. The court, assuming *arguendo* that the trial judge erred in denying the defense's motion to suppress, upheld the conviction because the appellant had judicially confessed in his testimony on the motion.

The Court of Military Appeals held that petitioner's self-incriminating testimony during the suppression hearing could not be used against him on the merits, but affirmed the Air Force Court of Military Review's decision because there was sufficient evidence of cocaine use other than the petitioner's sworn testimony to sustain his conviction. *U.S. v. Martinez*, 28 M.J. at 59.

## REASONS FOR GRANTING THE WRIT

This case calls into question the limitations that should be placed upon the use of drug abuse evidence which is obtained under an administrative regulation. In light of recent

expansion of urine testing for noncriminal purposes,[5] the potential availability of this evidence to civilian law enforcement officials will be greatly expanded. Since the administrative program in this case encroaches upon critical Fourth and Fifth Amendment procedural rights, this case has broad application to the law.

It is well established that government agencie must scrupulously comply with their own regulations when the underlying purpose of such regulations is protecton of personal liberties or interests, and when these agencies fail to do so their action cannot stand. *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *U.S. ex rel Coates v. Laird*, 494 F.2d 709, 711 (4th Cir. 1974); *U.S. v. Hefner*, 420 F.2d 809, 811-812 (4th Cir. 1970); *U.S. v. Russo*, 1 M.J. 134, 135 (C.M.A. 1975). Petitioner was denied due process of law because the Air Force failed to obey its regulation allowing drug abusers to self-identify without fear of being criminally prosecuted. Air Force Regulation 30-2 sets forth in clear terms a comprehensive procedure for accepting and processing self-disclosed drug abusers. The program affords qualified participants protection from prosecution analogous to testimonial immunity.

To qualify, participants must not have been apprehended, placed under investigation for drug abuse, ordered to submit a urine sample, or advised of a recommendation for administrative discharge for drug abuse, at the time they reveal their drug involvement to their unit commander, first sergeant, social actions personnel or medical personnel. The purpose of these requirements was abundantly clear. The Air Force did not want the program

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[5] *Skinner v. Railway Labor Executives' Association*, ____ U.S. ____, 57 L.W. 4324 (1989); *National Treasury Employees Union*, ____ U.S. ____, 57 L.W. 4338 (1989).

to be subject to abuse by drug offenders who, once their drug involvement became known by the authorities, would claim a desire to be rehabilitated in order to avoid criminal prosecution.

The regulation envisions a two step process for a member's self-identification: first, the member presents himself for drug rehabilitation, and the provisions of the program must be fully explained before any specific information is elicited; second, the member then discloses the extent of his drug abuse and is entered into the evaluation program. If the member is found to have a drug abuse problem, then he is entered into the drug treatment and rehabilitation program. The petitioner never got beyond the first step because he was never advised of the provisions of the program, thus he never made a disclosure pursuant to entry into the program.

The evidence from the record clearly shows that the petitioner had an honest desire to receive help with his drug problem and that he unquestionably met the program's qualifications on May 12, 1986. No one suspected him of abusing cocaine before his statements to Foster on May 11, 1986, and no disqualifying actions had been taken at the time he presented himself to McDougle for rehabilitation.

The government failed to follow its own regulations on several different occasions. McDougle failed to advise petitioner of the provisions of the program and to enter him into it when he first presented himself for rehabilitation on May 12. A few minutes later, Brewer circumvented the program entirely, even though petitioner had met its qualifications. On May 14, although she knew that petitioner had not received help two days before and knew that he had not been entered into the program, McDougle again failed to advise him of his rights, and enter him into the program. And later, after the petitioner was in pretrial

confinement, his commander failed to insure that he received rehabilitation.

The trial judge erred in denying the defense's motion to suppress. Although he observed that the petitioner had met all the required conditions, the trial judge found that the petitioner had not properly self-identified under the program. (R. 146). Apparently the judge added an additional, unwritten condition that the government must not have any independently derived evidence of drug abuse for an applicant to be qualified. The judge identified as independently derived evidence the petitioner's statements to Foster, Haney and Newberry. Although an agency's interpretation of a regulation is given great deference by the courts, the plain language of the regulation controls, and if a violation subjects a person to criminal sanctions, the regulation cannot be construed to mean what the agency meant, but inadequately expressed. *Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Comm.*, 528 F.2d 645 (5th Cir. 1976); *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm.*, 681 F.2d 1189 (9th Cir. 1982). By adding an unwritten condition, the judge ignored the plain language of the regulations.

The judge also erred by finding petitioner's admissions of using cocaine on the evening of May 12th were not privileged because the limitations of self-disclosed drug abuse only apply to use prior to the first disclosure. Petitioner never made an initial disclosure under the program because Brewer never gave him a chance. When Brewer dealt with the petitioner on May 12, his efforts were to obtain evidence for disciplinary action. Although he told the petitioner he wanted to help him (R. 85), Brewer never intended for the petitioner to enter the self identification program. Under the procedures set forth in Air Force Regulation 30-2, petitioner was never truly entered into

the program. Therefore, the limitation on post-disclosure drug abuse simply should not apply.[6]

For the same reasons, the Court of Military Appeals erred in finding the petitioner was not entitled to the sanctuary provided by the program because he was only convicted of use "*after* the time appellant contends he was *de facto* in the rehabilitation program," and admissions of drug use subsequent to entry would not have been protected. *U.S. v. Martinez*, 28 M.J. at 59. All of the government's evidence was obtained following and as a direct result of violations of the privileges afforded by the self-identification program. No truly independent evidence of guilt was ever introduced.[7]

In this case, the petitioner attempted to properly seek rehabilitation under an Air Force program which encourages members to seek help by offering a limited type of immunity. The Air Force, through Brewer, improperly denied petitioner's entrance into the program and began a criminal investigation based upon petitioner's attempt to

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[6] McDougle also failed to advise petitioner of his Article 31 rights on May 14, 1986. Since she knew that he was suspected of cocaine use and she was acting pursuant to her duties, the petitioner's admissions to her of using on May 12 should have been inadmissible. *U.S. v. Duga*, 10 M.J. 206 (C.M.A. 1981).

[7] The evidence in the record of the petitioner's cocaine use on the evening of May 12, 1986 is extremely limited. McDougle testified to an admission made by petitioner to her on May 14, while driving to the Social Actions office with petitioner and Foster. (R. 132). However, Foster gave no evidence at trial on this admission. In a stipulation of expected testimony, First Lieutenant George Roose, a physician's assistant, said the petitioner admitted "that his last use had been on 12 May 1986." (R. 125). However, this admission does not clearly indicate whether it was before or after the petitioner went to Social Actions. The medical urinalysis suffers the same deficiency. It does not provide proof that the petitioner used cocaine after his admissions on May 12, 1986.

self identify. This type of abuse of an administrative program has potential application wherever government agencies gather incriminating information or evidence through voluntary and compelled activities.

## CONCLUSION

The petitioner submits that he has suffered a denial of due process of law. Therefore, his petition for writ of certiorari should be granted.

RICHARD F. O'HAIR
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*Counsel for Petitioner*

JUNE 1989

# APPENDICES

UNITED STATES COURT OF MILITARY APPEALS

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No. 58,332
ACM 25681

UNITED STATES, APPELLEE

*v.*

MARTIN D. MARTINEZ, AIRMAN FIRST CLASS,
U.S. AIR FORCE, APPELLANT

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April 3, 1989

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For Appellant: *Major Mark R. Bell* (argued); *Colonel Leo L. Sergi* (on brief); *Colonel Richard F. O'Hair* and *Major Harry L. Heintzelman, IV.*

For Appellee: *Captain Jeffrey H. Curtis* (argued); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni* (on brief).

*Opinion of the Court*

COX, Judge:

Appellant was admittedly addicted to cocaine. In May 1986, he absented himself without authority. While absent on May 11, he called Senior Airman Foster, a friend and coworker, to get advice on how to turn himself in for drug rehabilitation treatment. Foster suggested he get advice from the area defense counsel. Martinez then called his

NCOIC, Senior Master Sergeant Newberry, and sought his advice. Newberry advised him to go to the Social Actions Office instead. Newberry next reported this conversation to Senior Master Sergeant Brewer, appellant's first sergeant.

On Monday, May 12, appellant went to the Social Actions Office on the base to seek help for his addiction and to avail himself of the protection afforded "self-admitted" drug users. Air Force Regulation (AFR) 30-2, *Social Actions Program* June 22, 1981, as amended by Interim Message Change 82-3, December 22, 1982, sets forth a drug rehabilitation program which encourages drug users to turn themselves in for help. In return, the regulation protects the user from self-incrimination.[1]

Appellant was met at the Social Actions Office by his first sergeant. He was taken to the base hospital for an examination. The examination included a consensual urinalysis. *See United States v. White,* 27 MJ 264 (CMA 1988). Appellant was not admitted to the hospital, but the

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[1] The regulation provides at paragraph 4-3D:

Self Indentification. Personnel with drug or alcohol problems are encouraged to seek assistance. Air Force members concerned about a drug or alcohol problem may refer themselves for the evaluation process. Personnel in this status must complete the DAAEP (Drug and Alcohol Abuse Control Evaluation Process] to assess the scope of their problem. Following the DAAEP a rehabilitation committee will recommend an appropriate course of action to the commander.

(1) Under the conditions specified below, an Air Force member's voluntary submission to an Air Force treatment and rehabilitation program, and self-disclosed evidence of prior personal drug use or prior possession of drugs for personal use voluntarily disclosed by the member as part of the first entry into such programs, may not be used against the member in disciplinary action under the UCMJ or to characterize an administrative discharge. . . .

squadron was instructed to return him to the emergency room if he craved cocaine. The doctor had prescribed substitute, nonaddictive drugs for appellant which would be kept on hand in the emergency room.

Notwithstanding this medical advice, appellant was sent home by his unit on the evening of May 12. There, he used a massive dose of cocaine with the avowed purpose of overdosing.

As a result, he was again absent on May 13, and a search for him commenced. He was found on May 14 and placed in pretrial confinement. Ultimately, he was tried by general court-martial, military judge alone, on two specifications of absence without leave and one of using cocaine on or about May 12, 1986, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 USC §§ 886 and 912a, respectively.

At trial, appellant moved to suppress all evidence regarding his cocaine use on the grounds that he had self-identified himself "to the Social Actions drug program for rehabilitation" pursuant to AFR 30-2. To support the motion, appellant testified about his attempts to turn himself in to the Social Actions representatives.

Contesting the motion, the Government presented the testimony of several witnesses which depicted a different version of events. Although the record is not clear, defense counsel and trial counsel apparently agreed that evidence offered in the suppression hearing would be used on the merits. Except as otherwise noted in this opinion, defense counsel offered no objection to this assertion. The only information offered to support appellant's use of cocaine was presented during the suppression motion. Based on this evidence, the military judge found appellant guilty of this offense. Significantly, he found appellant guilty of use on or about May 12, 1986.

Before the Court of Military Review, appellant contested his conviction of cocaine use, arguing then, as he does before us, that the evidence of cocaine use was all provided by him incident to his efforts to seek help for his addiction and that AFR 30-2 offered him a safe haven whereby he could freely admit his use without fear of incrimination. Para. 4-3D, AFR 30-2.

Although the court below had the opportunity to interpret its own regulation and it has on other occasions shown its expertise in that regard, it declined to do so here. *See, e.g., United States v. Walkin,* 27 MJ 532 (AFCMR 1988). Instead, the court found:

> Without addressing the potential harm to the drug rehabilitation program that apprehending individuals seeking help for drug abuse at the Social Actions office may have, and assuming, *arguendo,* that the trial judge erred in denying the Motion to Suppress, the appellant's conviction for drug abuse must still be upheld since he judicially confessed during direct and cross-examination that he used cocaine on 12 May 1986. Further, since the appellant judicially admitted his drug abuse, corroboration of his admission is not required. Mil.R.Evid. 304(g); *United States v. Crayton,* 17 M.J. 932 (A.F.C.M.R.1984).

Unpub. op. at 2-3.

[1] When appellant's appeal reached us, we agreed, among other issues, to consider whether the testimony offered him during the suppression hearing was a "judicial confession."[2] A judicial confession is the strongest form

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[2] This Court granted review of the following issues:

I

WHETHER APPELLANT'S JUDICIAL CONFESSION CONTAINED IN TESTIMONY FOR THE LIMITED PURPOSE OF

of incriminating evidence. *See United States v. Dusenberry*, 23 USCMA 287, 49 CMR 536 (1975). Indeed, it is the fundamental basis of a guilty plea and an accused may be convicted upon his judicial confession without any corroborating evidence. *See United States v Davenport*, 9 MJ 364 (CMA 1980); RCM 910(c)(4) and Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984. If

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A SUPPRESSION MOTION COULD PROPERLY BE USED BY THE COURT OF REVIEW TO ESTABLISH APPELLANT'S GUILT.

II

WHETHER THE MILITARY JUDGE ERRED IN NOT SUPPRESSING APPELLANT'S STATEMENTS CONCERNING HIS USE OF COCAINE.

III

WHETHER THE MILITARY JUDGE ERRED IN NOT SUPPRESSING THE RESULTS OF A URINALYSIS BECAUSE APPELLANT'S CONSENT TO A SEARCH OF HIS URINE ON 12 MAY 1986 WAS INVOLUNTARY.

IV

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE DERIVED FROM APPELLANT'S EFFORTS TO OBTAIN HELP IN OVERCOMING HIS COCAINE ADDICTION UNDER THE AFR 30-2 SELF-IDENTIFICATION PROGRAM.

V

WHETHER THE GOVERNMENT FAILED TO "FULLY EXPLAIN" THE PROVISIONS OF THE SELF-IDENTIFICATION PROGRAM AS REQUIRED BY AFR 30-2, PARAGRAPH 4-3D(5) AND ALL EVIDENCE DERIVED FROM APPELLANT'S SELF-IDENTIFICATION OF HIS COCAINE USE SHOULD BE SUPPRESSED.

appellant did judicially confess, then the Court of Military Review was justified in declining the rule on the fundamental question regarding applicability of AFR 30-2 to the facts of this case.

[2] Although the Government offers an attractive argument that appellant "judicially confessed," we decline to so hold.

[3] First, it is clear that, at the time appellant took the witness stand, his testimony was offered for the limited purpose of litigating the suppression motion. Defense counsel specifically stated, "Your Honor, defense calls Airman Martinez for the limited purpose of testifying regarding the issues in the Motion." If that be the case, his testimony can only be used for that purpose. Mil.R.Evid. 105 and 304(f); *Simmons v. United States,* 390 U.S. 377, 389-94, 88 S.Ct. 967, 973-76, 19 L.Ed.2d 1247 (1968).

[4] Second, although the Government points to trial counsel's unchallenged assertion that evidence on the motion would, "in accordance with the prior agreements . . . be used for the merits of the case," there is no clear and unambiguous agreement by defense counsel that this assertion applied to appellant's testimony. We decline to infer from defense counsel's silence that this was his intent.

Third, it is unreasonable to believe that appellant would offer his confession on the merits as a defense to allegations of cocaine use in light of his plea of not guilty to the charge. It does not make sense to defend against a charge by admitting that you did it.

[5] Absent a clear agreement by counsel *on the record* that self-incriminating testimony offered by an accused during a suppression hearing can be used against the accused on the merits, we decline to allow it. *See Simmons v. United States, supra.*

[6] However, this holding does not lead us to conclude that appellant is entitled to a reversal of his conviction. It is significant to note that, although the evidence elicited at trial proved cocaine use prior to and after the events of May 11 and 12, appellant was convicted only of use on or about May 12. This use occurred *after* the time appellant contends he was *de facto* in the rehabilitation program.[3]

[7] Appellant urges us to place the blame for this subsequent drug use on the Air Force because he was not formally enrolled in the drug-abuse program despite his efforts, and, therefore, he was not advised that subsequent use would not be protected. This we decline to do. There is sufficient evidence of appellant's cocaine use other than that contained in his sworn testimony to sustain his conviction.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

SULLIVAN, Judge (concurring):

I agree that Issues IV and V are without merit because this exclusionary-type rule does not extend to acts of drug use subsequent to entry in the program. Accordingly, I reject appellant's contention on Issue II that admission of evidence of appellant's statements after May 12, 1986, is

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[3] Because the military judge limited his findings of guilty to the subsequent cocaine use, we need not decide whether appellant was in the rehabilitation program and entitled to the sanctuary it provides. Even if he had been in the program, his subsequent drug use would not have been protected.

barred by this regulation. Para. 4-3D(3), AFR 30-2, IMC 82-3 (Dec. 1982). Any other objection to admission of these statements was not properly made at trial. Mil.R.Evid. 103, Manual for Courts-Martial, United States, 1984.

As for Issue III, I find its resolution is irrelevant in view of the proper admission of evidence of a positive urinalysis dated May 14, 1986. Finally, I agree with Judge Cox with respect to Issue I and note that evidence of the May 14, 1986, positive urinalysis and testimony from other witnesses concerning appellant's statements after May 12, 1986, render this error harmless.

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

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ACM 25681

UNITED STATES

*v.*

AIRMAN FIRST CLASS MARTIN D. MARTINEZ,
FR 525-06-2244
UNITED STATES AIR FORCE

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19 JUNE 1987

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Sentence adjudged 21 August 1986 by GCM convened at Luke Air Base, Arizona. Military Judge: Mark S. Anderson (sitting alone).

Approved Sentence: Bad conduct discharge, hard labor without confinement for three (3) months, restriction to base for two (2) months, forfeiture of four hundred twenty-six dollars ($426.000) pay per month for four (4) months and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo. L. Sergi and Major Harry L. Heintzelman, IV. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Captain Jeffrey H. Curtis.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges

**DECISION**

Per Curiam:

The appellant was convicted of two short absences without leave and a single allegation of cocaine abuse occurring on 12 May 1986. His appeal focuses on whether he voluntarily disclosed his prior drug use to approprate Air Force personnel thereby precluding the prosecution from using any statements made by him during the course of the self-identification process together with the results of any urinalysis test conducted as a part thereof. See Air Force Regulation 30-2, *Social Actions Program*, 22 June 1981 as amended by Interim Message Change 82-3, 22 December 1982.

The facts, in general, are undisputed. The appellant sought help in combatting his cocaine abuse habit by first contacting a civilian Cocaine Hot Line on 10 May and the next day by telling an Air Force friend that he was "using cocaine to cope" and wanted "rehabilitation." That same afternoon his immediate supervisor, Staff Sergeant Gregory Hanley, who knew the appellant was absent without leave, went to his apartment to ask "Why he was not at work?" During the conversation the appellant admitted using cocaine and indicated his intention to turn himself into Social Actions the next day, a Monday. The appellant also telephoned Senior Master Sergeant John Newberry that same day and told him of his drug problem. Newberry suggested that he contact the Social Actions office. Additionally, Newberry called the appellant's first sergeant, Senior Master Sergeant John Brewer, and told him of the appellant's drug problem and the latter's intention to seek help at the Social Action office. Thereafter, Brewer called Social Actions and asked that he be informed when the appellant arrived.

On 12 May, Haney took the appellant to Social Actions where he was initially met by a drug and alcohol counselor who excused herself and called Brewer who arrived within a few minutes. Brewer then asked the appellant to provide a urine sample indicating that if he did not, he would be directed to do so by the commander. The appellant provided the sample and was then taken to the hospital where an examination disclosed "needle tracks" on his arms.

The appellant was then returned to the Social Actions office where he was interviewed by Brewer. After the proper codal warnings and advice on the right to counsel, the appellant admitted using cocaine. The urine samples given on 12 and 14 May both tested positive for cocaine. During his testimony at trial, the appellant admitted using cocaine on 12 May 1986.

At trial the prosecution argued that the self-referral process by the appellant had not been completed, and in any event the first sergeant knew of the appellant's drug abuse when he apprehended him at the Social Actions office. The trial judge held that the self-referral protection provision of Air Force Regulation 30-2 should be strictly construed otherwise it would be subject to abuse. He denied the Motion to Suppress stating that the appellant "did not self-identify himself" as required by regulation even though "he may have been trying to do so."

Without addressing the potential harm to the drug rehabilitation program that apprehending individuals seeking help for drug abuse at the Social Action office may have, and assuming, *arguendo*, that the trial judge erred in denying the Motion to Suppress, the appellant's conviction for drug abuse must still be upheld since he judicially confessed during direct and cross-examination that he used cocaine on 12 May 1986. Further, since the appellant judicially admitted his drug abuse, corrobora-

tion of his admission is not required. Mil. R. Evid. 304(g); *United States v. Crayton*, 17 M.J. 932 (A.F.C.M.R. 1984).

The remaining assigned errors are resolved adversely to the appellant. *United States v. Durant*, 16 M.J. 712 (A.F.C.M.R. 1983); R.C.M. 305(k). The finding of guilty and the sentence are

AFFIRMED.

SEAL

OFFICIAL:

/s/ Pamela Howard
PAMELA HOWARD
Captain, USAF
Chief Commissioner

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Supreme Court, U.S.
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CLERK

No. 88-1930

# In the Supreme Court of the United States

OCTOBER TERM, 1989

MARTIN D. MARTINEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether evidence was introduced against petitioner in violation of an Air Force regulation that supplies a servicemember with a limited form of immunity for statements he makes about prior drug use when he voluntarily presents himself for admission into a drug rehabilitation program.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-8a) is reported at 28 M.J. 56. The opinion of the Air Force Court of Military Review (Pet. App. 9a-12a) is unreported.

### JURISDICTION

The judgment of the Court of Military Appeals was entered on April 3, 1989. The petition for a writ of certiorari was filed on May 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

### STATEMENT

Petitioner, a member of the United States Air Force, was convicted at a general court-martial of being absent without leave for two periods, in violation of Article 86 of

the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 886, and of the wrongful use of cocaine on or about May 12, 1986, in violation of Article 112a of the UCMJ, 10 U.S.C. 912a (Supp. V 1987). Petitioner was sentenced to three months' confinement, restriction to base for two months, a bad conduct discharge, forfeiture of $426 pay per month for four months, and a reduction in rank. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed petitioner's conviction. The Court of Military Appeals affirmed.

1. The Air Force operates a drug rehabilitation program in order to encourage narcotics addicts and other drug users voluntarily to seek professional help to overcome their addiction. In order to qualify for the program, a servicemember must voluntarily reveal the nature and extent of his drug problem to his unit commander, his first sergeant, personnel of the Social Actions Unit, or medical personnel before he becomes suspected of (or is charged with) narcotics use. Air Force Reg. 30-2, Personnel, Social Actions Program, para. 4-3d(1)(A) (June 22, 1981), as amended by Interim Message Change 83-2 (Dec. 22, 1982).[1] The servicemember's commanding officer is re-

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[1] The regulation in effect at the time of the relevant events provided in part:

> 4-3. **Identification and Drug and Alcohol Abuse Control Evaluation (DAAEP) Process:**
>
> d. **Self Identification.** Personnel with drug or alcohol problems are encouraged to seek assistance. Air Force members concerned about a drug or alcohol problem may refer themselves for the evaluation process. Personnel in this status must complete the DAAEP to assess the scope of their problem. Following the DAAEP a Rehabilitation Committee will recommend an appropriate course of action to the commander.
>
> (1) Under the conditions specified below, an Air Force member's voluntary submission to an Air Force Treatment

sponsible for deciding whether to admit him into the program. Tr. 50-51, 54. Statements made by a servicemember regarding his drug use "prior to the disclosure" cannot be

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and Rehabilitation Program, and self-disclosed evidence of prior personal drug use or prior possession of drugs for personal use voluntarily disclosed by the member as part of the first entry into such programs, may not be used against the member in disciplinary action under the UCMJ or to characterize an administrative discharge:

(A) Members voluntarily reveal the nature and extent of their drug involvement to their unit commander, first sergeant, social actions personnel or medical personnel before they are apprehended, placed under investigation for drug abuse, ordered to give a urine sample under para 4-2d(1)(A), (B), (D) above, or advised of a recommendation for administrative separation for drug abuse; and

(B) Members identify themselves with the intention of receiving rehabilitation; and

(C) Members are determined to have a substantiated drug abuse problem (as explained in para 3-3c(7)).

(2) Members are considered under investigation when the appropriate initial case entry is made in a security police blotter or the security police investigator's log of cases, or when a commander has requested (either in writing or verbally) an investigation according to AFR 124-4.

(3) The limitations of para 4-3d(1) apply only to the member's self-disclosed personal use of drugs or possession of drugs for personal use which occurred prior to the disclosure. The limitations do not apply to:

(A) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been introduced by the member; and

(B) Disciplinary or other action based on independently derived evidence, including evidence of drug abuse after the member's first entry into the Drug Treatment and Rehabilitation Program.

used against him in criminal proceedings under the Uniform Code of Military Justice or in order to characterize an administrative discharge as being on less than honorable conditions. Air Force Reg. 30-2, para. 4-3d(1); Tr. 55. The regulation also expressly provides, however, that the safe harbor it establishes does not apply to "evidence of drug abuse after the member's first entry into the Drug Treatment and Rehabilitation Program." Air Force Reg. 30-2, para. 4-3d(3)(B). The question in this case is whether evidence was admitted at petitioner's court-martial in violation of that regulation.

2. Petitioner was absent from his unit without leave (AWOL) from May 7 to 12, 1986. Initial efforts to locate petitioner proved unsuccessful. On May 11, petitioner placed a telephone call to one of his co-workers, Airman Gregory Foster. Tr. 37. Petitioner told Foster that he had been using cocaine in order to cope with the pressure of his workload. Tr. 38, 40. Foster suggested that petitioner speak with the Area Defense Counsel and enroll at the Social Actions Office. May 11 was a Sunday and the offices were unstaffed, so petitioner and Foster decided to meet at the Area Defense Counsel's office the next morning. *Ibid.* Foster also told petitioner that Sergeant Newberry, their Flight Chief, wanted petitioner to call him. Tr. 39; Pet. App. 1a-2a, 10a.

That evening, after petitioner had spoken with Foster, Sergeant Gregory Haney, petitioner's supervisor, stopped by petitioner's apartment. Petitioner told Haney that he had spoken with Foster and that he was going to turn himself in the next day at the Social Actions Office, because he had personal and drug problems. Tr. 59, 65-66. After Haney left, petitioner called Sergeant Newberry and told Newberry that he had been using cocaine and that he was going to turn himself in the next day to the Social Actions Office. Pet. App. 1a-2a.

The following morning, May 12, Newberry told petitioner's first sergeant, Sergeant John Brewer, about his conversation with petitioner. Tr. 97-98. Sergeant Brewer then called the Social Actions Office and spoke with Staff Sergeant Ledora McDougle, a drug and alcohol counselor. Brewer informed McDougle that petitioner was likely to report to the Social Actions Office that day, and Brewer asked McDougle to notify him when petitioner arrived. Tr. 98-99, 127-128; Pet. App. 2a, 10a.

Petitioner did not meet Foster Monday morning at the Area Defense Counsel's office as they had planned. Tr. 40-41. As a result, Sergeant Haney went to petitioner's apartment and found petitioner asleep in bed at 11 or 11:30 a.m. Tr. 60. Haney drove petitioner to the Social Actions Office, where they met Sergeant McDougle. Tr. 60. Sergeant McDougle then notified Sergeant Brewer that petitioner had arrived. Tr. 128. When Brewer arrived at the Social Actions Office, he asked petitioner if petitioner was willing to provide a urine sample for drug testing. Tr. 100, 129. Petitioner agreed to do so, and he went to the base hospital, where a urine sample was collected. Tr. 100. Afterward, petitioner returned to the Social Actions Office, where he was questioned by Sergeant Brewer after being advised of and waiving his rights under Article 31 of the UCMJ, 10 U.S.C. 831. Petitioner admitted that he had been using cocaine. Tr. 100-101. Sergeant Brewer then transported petitioner back to the base hospital, where he was examined by a psychiatrist, who ordered a urine toxicology screen, a test designed to detect narcotics. Tr. 20, 102-104. Petitioner, however, left the hospital before providing the second urine sample. Tr. 22. That night petitioner again used cocaine. Tr. 145-146; Pet. App. 2a-3a.

Before leaving petitioner at the hospital, Sergeant Brewer instructed petitioner that he was to report for duty

the following morning, May 13, at 7:30 a.m. Tr. 104-105. The next day, however, petitioner went AWOL again. On May 14, concerned that petitioner might commit suicide, Foster and McDougle went to petitioner's apartment to return him to the base. Tr. 41-42, 130-131. While en route, petitioner said that he had used cocaine on May 12. Tr. 132. Petitioner's commander then decided to place petitioner in confinement. As part of the confinement process, petitioner was physically examined by Lieutenant George Roose, a physician's assistant. During the examination, petitioner said that he had used cocaine on May 12. Tr. 146. Roose also noticed needle marks on petitioner's arms. AX 4. A medical urinalysis was undertaken to examine petitioner's urine for drugs. The urinalysis tested positive for the presence of cocaine. Tr. 136-137, 146.

3. Before trial, petitioner moved to suppress his statements and all physical evidence obtained by the government after he sought to enroll in the drug rehabilitation program. AX 1. Petitioner claimed that he was "self-identifying himself" on May 12, and that any evidence thereafter obtained by the government was subject to suppression under Air Force Reg. 30-2. AX 1, at 1-2. The parties agreed to consolidate the suppression hearing with the trial, see Tr. 67, and, after hearing evidence, the trial judge denied petitioner's motion. Tr. 144-147. The judge concluded, inter alia, that petitioner's May 12 drug use was not protected by Air Force Reg. 30-2, and that petitioner's statements about that use and the urinalysis performed on May 14 therefore were not subject to suppression under the regulation. Tr. 147. Based on the evidence admitted at the suppression hearing, the judge found petitioner guilty of twice being AWOL and of using cocaine "about" May 12. Tr. 149-150.

## ARGUMENT

Petitioner challenges only his narcotics conviction and not his AWOL convictions. Petitioner contends that evidence was admitted at trial in violation of Air Force Reg. 30-2. That fact-bound claim does not warrant further review.

Air Force Reg. 30-2 supplies a limited form of immunity to servicemembers who voluntarily come forward to obtain assistance in overcoming drug use if they meet and comply with the provisions of the regulation. A servicemember is given immunity for information he reveals concerning drug use prior to the time he comes forward for help. Subsequent drug abuse is not protected, and a servicemember's statements about subsequent drug use are not entitled to immunity.

Those rules were not violated in this case. Although petitioner was originally charged with using cocaine from October 1, 1985, through May 14, 1986, the trial judge only found petitioner guilty of using cocaine on the evening of May 12, 1986, which occurred after petitioner had sought the assistance of the Social Actions Office. Tr. 147, 149-150. Moreover, the evidence that was used to establish petitioner's guilt of that offense—his remarks to Sergeant McDougle and Lieutenant Roose on May 14, and the test results of the urinalysis conducted on that date—related to drug use that was not "prior" to petitioner's arrival at the Social Actions Office. See also Air Force Reg. 30-2, para. 4-3d(3)(B) ("independently derived evidence" is not subject to immunity). Accordingly, the Court of Military Appeals correctly held that petitioner's conviction was supported by evidence that was not subject to exclusion under Air Force Reg. 30-2. Pet. App. 7a.

Petitioner contends that, because Sergeants McDougle and Brewer did not formally admit him into the drug re-

habilitation program and advise him about the limited immunity afforded by Air Force Reg. 30-2, he "was never truly entered into the program," and the exclusion in that regulation of statements made by a servicemember about post-admission drug use should not apply. Pet. 9-11. That argument is meritless. Sergeants McDougle and Brewer did not formally admit petitioner into the program,[2] but petitioner does not claim (and the evidence does not suggest) that they or anyone else misled him into believing that he was free to use cocaine after arriving at the Social Actions Office on May 12. Accordingly, petitioner had no reason to believe that he could use cocaine that evening, or that his later admissions that he did (as well as the urinalysis performed on May 14) could not be used against him at a court-martial.

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[2] As noted above, only petitioner's commanding officer could have formally admitted petitioner into the drug rehabilitation program. Petitioner criticizes Sergeant McDougle for not admitting petitioner into the drug rehabilitation program at the first opportunity on May 12. Pet. 9. That criticism is misdirected, because petitioner was largely responsible for any such failure. Petitioner had assured Foster that petitioner would meet him at the Area Defense Counsel's Office on the morning of May 12 to enter the rehabilitation program. Instead, Haney found petitioner asleep at home at 11 or 11:30 a.m., and petitioner spent the bulk of the remainder of the day at the hospital. Petitioner left the hospital at approximately 5 p.m., Tr. 75, and by that time duty hours were over. (In the Air Force duty hours generally run from 7 or 7:30 a.m. to 4 or 4:30 p.m. Most offices are not staffed after duty hours end.) Petitioner also criticizes Sergeant McDougle for not advising him of the provisions of the program, Pet. 9, but Air Force Reg. 30-2 does not require that a servicemember be told that he cannot continue to use drugs. Finally, petitioner complains that he was interrogated by Sergeant Brewer at the Social Actions Office during the day on May 12. But petitioner was convicted of using cocaine *after* the interrogation. Thus, any questioning of petitioner by Sergeant Brewer is immaterial.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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